TONG AIK (FAR EAST) LTD. v. EASTERN MINERALS & TRADING (1959) LTD.

[F.C. (Barakbah C.J. (Malaya), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) May 3, 1965]

[Singapore — Federal Court Civil Appeal No. 48 of 1964]

Companies — Winding-up — Application for winding-up of company registered in States of Malaya — No substantial assets in Singapore — Effect of Malaysia Act, 1963 — Constitution of Malaysia, art. 121(3) — Effect of judgment of High Court — Companies Ordinance (Cap. 174), s. 295 and Pt. XIII.

Constitutional Law — Constitution of Malaysia, art. 121(3) — Malaysia Act, 1963.

This was an appeal from the refusal of the High Court to make an order for the winding-up of the respondent company on the petition of the appellant company ([1964] M.L.J. 451). The ground for the petition was the inability of the respondent company to pay its debts. The respondent company was registered in the former Federation of Malaya and carried on mining activities in Kelantan. It had no substantial assets in Singapore.

Held: the absence of substantial assets in Singapore and consideration of the problems to which such an order might give rise in this case since the establishment of Malaysia, coupled with the complete absence of any suggestion that the appropriate proceedings cannot be taken under the Malayan enactment, are matters which justify the court in exercising its discretion against the making of a winding-up order in this case.

Per curiam: Enough has been said to show that an order for winding-up made under section 295 against the respondent company probably could not by its nature have full force and effect throughout Malaysia. Section 73(1) of the Malaysia Act (which was also the Act by which clause (3) of Article 121 of the Constitution was enacted) provides that existing laws are to be construed as if the Malaysia Act had not been passed. An order for winding-up under section 295 would, before Malaysia Day, have normally been confined in its effect to assets within the jurisdiction of the Supreme Court of Singapore and it seems the more reasonable view, therefore, to conclude that this is still the position.

Cases referred to:—

(1) *In re Western Canada Oil Lands & Works Co.* (1873) L.R. 17 Eq. 1.

(2) *Banque des Marchands De Moscou (Koupetschesky)* v. *Kindersley,* [1951] 1 Ch. 119.

(3) *Re Azoff-Don Commercial Bank* [1954] Ch. 315.

(4) *In re Matheson Brothers Ltd.,* (1884), 27 Ch.D. 225.

FEDERAL COURT.

K. E. Hilborne for the appellants.

Punch Coomaraswamy for the respondents.

Cur. Adv. Vult.

Wylie C.J. (Borneo): This is an appeal from the refusal of the High Court to make an order for winding up against the respondent company on the petition of the appellant company, the real ground advanced by the petition being that the respondent company is unable to pay its debts.

There is no doubt that the appellant has been unable to obtain payment of its judgment debt amounting to $7,504.80 and it is equally clear from the affidavit sworn on behalf of the respondent by one of its directors that that company is unable to pay its debts. There is also some indication from the record that those creditors who opposed the making of an order in the court below (but who did not wish to appear on the hearing of this appeal of which notice was given to them) may have other interests to serve other than their interests as creditors. Moreover, it can hardly escape comment that there has been no attempt by the respondent company to place any information before the court concerning the progress of the negotiations for the sale of its undertaking, which were put forward in the lower court as a reason why an order for winding up should not be made. See *In re Western Canada Oil Lands & Works Co.*(1) Consequently, even apart from questions raised by the appellant during the hearing in the High Court as to the validity of the debenture executed by the respondent in favour of the Lee Wah Bank Ltd., there would be a strong case for the court to exercise its discretion in favour of an order for winding up, if this petition for winding up had been brought against a company registered under the Companies Ordinance (Cap. 174) of Singapore or under any former Ordinance, that is to say, a company as defined for the general purposes of that Ordiance in section 2 thereof.

In that case, the petition would have been brought under section 168 of the Ordinance. This was the section under which the original petition was brought. In this petition it was alleged that the respondent was a company incorporated under the Companies Ordinance and had its registered office in Singapore. Subsequently, the petition was amended to allege that the respondent company was incorporated under the Companies Ordinance of the Federation of Malaya and that its registered office was in Kelantan (facts which are admitted) and the petition was at the same time amended so as to be brought under section 295(2) of the Ordinance relating to unregistered companies.

It is common ground that the respondent is an unregistered company as defined in section 294 of the Ordinance. In the affidavit filed on its behalf, it is stated that the company had a place of business in Singapore from 15th July, 1961, to 15th December, 1963, and that the Registrar of Companies was notified on 6th January, 1964, that the respondent company had ceased to maintain its place of business in Singapore. These statements have not been disputed.

The only activity of the company disclosed by the record is that of mining in the State of Kelantan and no evidence was brought by the appellant as to the existence of assets in Singapore at the date of presentation of the petition or the date of hearing. The company's balance

sheet produced by the respondent showed, as at 31st December, 1963, an amount of $6.33 as cash in hand at the Singapore office and an amount of $45.72 as cash at Lee Wah Bank Ltd., Singapore. This bank, the debenture-holder, is also shown as a secured creditor to the extent of $420,639.67 at the same date.

Where it is sought to obtain a winding up order against an unregistered company, that order is to be sought under subsection (1) of section 295. See *Banque des Marchands De Moscou (Koupetschesky)* v. *Kindersley* [2] at page 125, where the Master of the Rolls refers to the fact that all winding up orders in England are made under the corresponding provision, and not under the provision (section 400 of the Companies Act, 1948) corresponding to subsection (2) of section 295, the real effect of which is explained at pages 128 to 131. The appellant did not seek to challenge this interpretation of section 295(2). Indeed, the appellant's petition for a winding up order was based solely on the ground that the company was unable to pay its debts. In the case of an unregistered company, therefore, what really was sought was an order under section 295(1).

Such an order normally affects only assets within the jurisdiction of the court making the order and so would serve no useful purpose if there were no assets within the jurisdiction. In *Banque Des Marchands De Moscou (Koupetschesky)* v. *Kindersley* the Master of the Rolls, at the foot of page 125, enunciated the general principles in regard to making an order in the case of a foreign corporation in these words:—

> "As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present the exercise of the jurisdiction remains discretionary. *Prima facie* if the local law of the dissolved foreign corporation provided for the due administration of all the property and assets of the corporation wherever situate among the persons properly entitled to participate therein, the case would not be one for interference by the machinery of the English courts."

The Master of the Rolls observed that, in that case, there were "substantial assets" in England. In *Re Azoff-Don Commercial Bank* [3] the former decision was followed and applied and Wynn-Parry J. clearly relied on the fact that, in the latter case also, there were "substantial assets" in England.

In the present case, the appellant has not shown that there are any substantial assets in Singapore. As already observed, the balance sheet disclosed the existence of two minor assets in Singapore at 31st December, 1963. It is not known whether they still existed when the petition was heard and the more substantial of the two is probably under the control of the debenture-holder. In any case, the existence of minor assets of this nature could not possibly warrant setting in motion all the machinery of a company liquidation in the State of Singapore, assuming that a winding up order in Singapore made under this section would not reach the assets situated in the Malay States. Moreover, the Companies Ordinance (No. 13 of 1946) in force in the Malay States does provide for the due administration of the assets of the respondent company and there was no suggestion made during the hearing of this appeal that there was anything to prevent a petition being presented in the Malay States under that enactment. If such matters as the validity of the debenture are to be raised, obviously an order under that enactment, under which the company was incorporated, appears to be the appropriate order, as it is the only order that appears to suffice for that purpose. Even more important in reference to the last point made in the observations of the Master of the Rolls already quoted, is the reciprocal provision in Part XIII of the companies enactments of both Singapore and Malaya for a winding up order made by the local law of a corporation incorporated in one jurisdiction to be acted upon in the other jurisdiction without the necessity for formal winding up proceedings in the latter jurisdiction. While this would not exclude the power to act under section 295, it makes this case even less an appropriate case for interference by the Singapore courts.

Part XIII of the enactments was not referred to during the hearing of this appeal, but, in answer to the other points which I have suggested bear against the making of an order on this petition, it was submitted on behalf of the appellant that the position had changed since the establishment of Malaysia. It was contended that the effect of clause (3) of Article 121 of the Constitution is that, if an order for winding up was made on this petition, that order would now have the same effect throughout Malaysia as if an order for winding up had been made under the Malayan enactment. It is to be noted, however, that clause (3) provides that an order of a High Court is to have effect throughout the Federation so far as its nature permits and according to its tenor. As no order has been made, the effect of this clause of the proposed order cannot be accurately determined because the exact terms of the order are not known. Only then can the precise effect of its nature and its tenor be determined. It is obvious that, if an order is made by the High Court of Singapore which is expressed to be simply an order that a company be wound up and that order is made in respect of a company registered under the Malayan enactment, a number of difficult questions will arise. A simple judgment for the

payment of a debt may perhaps be executed throughout the Federation because its nature permits this to be done according to its tenor. An order for winding up, however, has many consequences. Some of these bear on the functions and powers of the registrar of companies and the official receiver which, so far as this Ordinance is concerned, are conferred and imposed only on those officials in Singapore. Consequently, such provisions as section 217 relating to dissolution become unworkable, if it is attempted to treat an order made under section 295 as having full effect throughout Malaysia in regard to winding up this company.

Enough has been said to show that an order for winding up made under section 295 against the respondent company probably could not by its nature have full force and effect throughout Malaysia. Section 73(1) of the Malaysia Act (which was also the Act by which clause (3) of Article 121 of the Constitution was enacted) provides that existing laws are to be construed as if the Malaysia Act had not been passed. An order for winding up under section 295 would, before Malaysia Day, have normally been confined in its effect to assets within the jurisdiction of the Supreme Court of Singapore and it seems the more reasonable view, therefore, to conclude that this is still the position.

This aspect, however, appears to raise purely academic questions. For these problems have only to be raised, as they have been in this case, prior to the making of a winding up order, to indicate that, even in a case where it was shown that substantial assets existed in Singapore, the court would not make an order under section 295 or any other order, in these circumstances, without ensuring, either as a matter of law or by the form of the order, that its effect would be confined to the same extent as it was before Malaysia Day, or, where, as in this case, no reason has been suggested why proceedings for winding up might not be taken under the Malayan enactment, without considering whether a restricted form of order might suffice until such proceedings were taken. A suitable restriction in a winding up order is set out in paragraph 68 at page 94 of Volume II of *Palmer's* Company Precedents (17th Edition). *In re Commercial Bank of South Australia* [4] and *in re Matheson Brothers Ltd.* [5] illustrate the course the court will be inclined to take to ensure that proceedings taken against an unregistered company incorporated elsewhere, which has substantial assets within the jurisdiction of the court, will not conflict with winding up proceedings being taken in the country of incorporation under legislation which the court is satisfied will protect local creditors. The case for avoiding any similar conflict in the present circumstances is stronger when all that is necessary is that the petitioning creditor commence proceedings in the same country in the appropriate court under the legislation under which the company was incorporated and no reason is advanced why that action is not being taken. That case is still further strengthened by the provisions of Part XIII of the Ordinance. For, even if there were substantial assets in Singapore, separate proceedings under section 295 would no longer be necessary, if a winding up order was made in Malaya under the Malayan enactment.

Consequently, I consider it inappropriate in the present case to decide what the effect of an order for winding up made under section 295 (the terms of which remain unknown) would be in the rest of Malaysia. The absence of substantial assets in Singapore and consideration of the problems to which such an order might give rise in this case since the establishment of Malaysia, coupled with the complete absence of any suggestion that the appropriate proceedings cannot be taken under the Malayan enactment, are matters which, in my judgment, justify the court in exercising its discretion against the making of a winding up order in this case.

From what I have said, it follows that there is no need for me to consider that part of this appeal which arises from the refusal of the judge to make an order amending the petition.

For the foregoing reasons I would dismiss this appeal with costs and express the hope that it will not be long before there is uniform companies legislation throughout Malaysia.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Hilborne & Co.; Braddell Bros.*

DAMU JADHAO v. PARAS NATH SINGH

[F.C. (Barakbah C.J. (Malaya), Wee Chong Jin C.J. (Singapore) and Wylie C.J. (Borneo)) May 3, 1965]

[Singapore — Federal Court Civil Appeal No. 98 of 1964]

Practice and procedure — Appeal — Appeal on question of fact — Finding of trial judge based on oral evidence before it — Principle applicable.

Evidence — Unstamped document — Whether document should be impounded — Admissibility of — Stamp Ordinance (Cap. 170).

This was an appeal against the finding of the trial judge who had dismissed the claim of the appellant for the sum of $2,500 for money lent by him to the defendant under an agreement in writing ([1965] 2 M.L.J. 38). The two main grounds of appeal were (a) that the trial judge should have impounded the document and that it was a document which could be stamped after payment of a penalty and thereafter be receivable in evidence to support the appellant's claim and (b) that the trial judge's finding of facts was against the weight of evidence.

Held: (1) even assuming the appellant's first contention is right the same issue was before the trial court